

CHEW CHEE BENG AND 2 OTHERS v. REX.[App. Crim. Juris. (Willan, C.J.) September 20, 1947]
[Penang — Cr. Appeal No. 103 of 1947]

Criminal trial—Procedure to be adopted in assigning counsel where prisoners are jointly charged with a capital offence.

Where two or more accused were jointly charged with murder and the defences were such that they ought to have been, but were not, separately represented, a re-trial was ordered.

COURT OF APPEAL.

E. A. de Buriatte for the Appellants (Assigned).

C. Wylie (Crown Counsel) for the Respondent.

The judgment fully defines the practice as to the assignment of Counsel in such cases.

The judgment of the Court of Appeal was given by

Willan, C. J. : — In this case the three Appellants were jointly charged with murder and all three were convicted.

Prior to the trial, in accordance with the usual practice, Counsel was assigned to defend all three Appellants at their trial. Having read the depositions taken at the preliminary inquiry, Counsel informed the Assistant Registrar, Supreme Court, Penang, that in his opinion each Appellant should be separately represented by Counsel because of the clash of interests between them.

The Assistant Registrar referred this application to Crown Counsel, who was to prosecute at the trial, and he advised that the assignment of separate Counsel for each of the Appellants was unnecessary.

At the trial the one Counsel assigned to defend all three Appellants made no further application to the trial Judge on this matter, with the result that the trial proceeded and was concluded with one Counsel representing all three Appellants. In our opinion Counsel was wrong in not renewing his application in Court.

It is clear from the record that there was a clash of interests between the Appellants, in that the second Appellant had made a statement to a Magistrate accusing the third appellant of committing the murder, and the third Appellant had made a statement to a Magistrate in which he alleged that it was the first appellant who had accused him of committing the murder.

On the ground that the three Appellants should have been separately represented by Counsel at their joint trial we allowed this appeal and ordered a new trial.

The purpose of this judgment is to lay down the procedure which should be followed when applications such as the one in this case are made.

In the first instance we can see no reason why any such application should be referred to Crown Counsel.

In making any such application to the Registrar, or Assistant Registrar, Supreme Court, as the case may be, the one Counsel first assigned should state with some particularity the reasons why it is necessary that the persons committed for trial should be separately represented by Counsel. In the majority of cases, if the reasons are fully set out, the Registrar, or Assistant Registrar, will be able to accede to the application at once.

If the Registrar, or Assistant Registrar, has any real doubt he should refer the application for a decision to the Judge who is to preside at the trial.

If the application is refused by the Judge, Counsel, if he still believes that separate representation is necessary, should renew his application in Court at the commencement of the trial so that if it is again refused, and convictions are had, there will be on record for the Court of Appeal the reasons for the refusal of the application.

Appeal Allowed.

SEAH CHAY TEE v. PUBLIC PROSECUTOR.[App. Crim. Juris. (Laville, J.) November 24, 1947]
[Johore Bahru — Cr. Appeal No. 30/47]

Offences against the Forces Proclamation (Proclamation 50) Section 5 (1) — Possession of Military goods — Necessity of showing that possession is effective and exclusive — Evidence of co-accused.

In this case the appellant was charged with three others with possession of military goods contrary to S. 5 (1) of Proclamation 50. The evidence was that the four accused were in a car, stopped by the police, in which were found 2 wheels and 12 coils, which were alleged to be military property. No attempt was made to prove that one or some or all of the accused had any control over or the power to dispose of the goods. The only evidence against the appellant was that of his co-accused.

Held, (1) that where possession imports criminality it must be proved that the possession is effective and exclusive, that is, that the person or persons charged have the control over and the disposition of the goods found with him or them and that no other persons have; (2) that the evidence of a co-accused against his fellow accused should be given even less weight than that awarded to the evidence of an accomplice and requires stronger corroboration; (3) that in this case there was no corroboration of the evidence of the co-accused by untainted evidence; (4) that in this case the prosecution had failed to make out a case against the accused and all of them should have been discharged at the close of the prosecution.

CRIMINAL APPEAL.

P. V. Charry for the Appellant.

W. M. McCall (Crown Counsel) for the Respondent.

Laville, J. : — In this case appellant was charged with three others with possession of military goods, to wit, 2 wheels complete with tyres and 12 coils on 13.8.1947 at 3rd mile Jalan Kota Tinggi in a car, contrary to Section 5 (i) Proclamation 50.

The prosecution evidence was that police stopped a car, number not recorded, at 10.30 p.m. on that date at the junction of Kota Tinggi and Kebun Teh Roads: in it were the four accused and the two tyred wheels and a bag containing the coils: they gave no satisfactory account of how the goods came into their possession and were arrested.

An R.A.O.C. officer proved the wheels bore the W.D. mark and were similar to wheels and tyres in his charge at the Tebrau lorry park.

There was no attempt to prove which of the four had effective possession of these goods or that the possession was joint.

It is well established law that where possession imports criminality it must be proved that the possession is effective and exclusive, that is, that the person or persons charged have the control over and the disposition of the goods found with him or them and that no other persons have. In this case four men were found in conjunction with these articles and no attempt was made to prove that one, or some, or all of them had such control or power to dispose of the goods.

The learned District Judge, however, called on the defence and on the evidence of three of the accused decided that the present appellant was in possession of the goods. There was no other evidence save that of his co-accused against the appellant. The evidence of a co-accused against his fellow accused is to be given even less weight than that awarded to the evidence of an accomplice, and requires stronger corroboration. There was no corroboration by untainted evidence and, legally speaking, one accomplice cannot corroborate another.

The prosecution failed to make out a case and all accused should have been discharged at the close of the prosecution, nor can the evidence of the three co-accused support a conviction of the appellant. It was the duty of the prosecution, if the co-accused's statements to the police were similar to those they made in Court, to decide which of the arrested men could be proved to have possession and call the other members of the party in the car as witnesses.

For these reasons the appeal must be allowed and the conviction and sentence set aside, and I so order.

Appeal Allowed.

LUANG BHASA BHERAJ AND ANOTHER v. TAN KIM LEAN.*

[Penang — Civil Suit No. 49 of 1947 (Carey, J.)
September 17, 1947]

Landlord and Tenant — Crucial date for the purposes of Increase of Rent (Restriction) Ordinance 1939 — Notice to quit.

The Plaintiff's claim was for possession of the premises let to the defendant on a monthly tenancy. At the date of service of the Notice to Quit rent was in arrears for more than 14 days.

A preliminary point arose as to whether the crucial date for the purposes of the Increase of Rent (Restriction) Ordinance 1939 was the date of service of the Notice to Quit or the date when the Writ was issued.

Held, that as soon as a tenant becomes fourteen days in arrear with his rent lawfully due the right accrues to the landlord to put in motion all steps to effect recovery of possession. The first step is to serve a Notice to Quit and on expiry thereof he may issue his Writ claiming possession. His course of action arose from failure on the part of his tenant to pay his rent after it became due.

Held also, following *Davies v. Bristow* (1920) 3 K.B. 428 that by the acceptance of rent the landlord is not to be taken as assenting to a renewal of the tenancy for he has no choice but to accept it and the tenant is regarded as holding over against the will of the landlord by virtue of the Ordinance.

Cases referred to :—

- (1) *Wagner & anor. v. Tan Eng Yeow* (1947) M.L.J. 33.
- (2) *Low Bee Hoe v. Morsalim and Goh Tien Lim v. Lee Ang Chin* (1947) M.L.J. p. 3.
- (3) *Davies v. Bristow* (1920) 3 K.B. 428.
- (4) *Hunt v. Bliss* (1919) W.N. 331.
- (5) *Aston v. Smith* (1924) 2 K.B. 143.

CIVIL SUIT.

F. G. Pooley for the Plaintiffs.

Ong Huck Lim for Defendant.

Carey, J. : — The writ herein is specially endorsed with the following claim :—

"The Plaintiffs' claim is for possession of premises known as Nos. 419, 425, 427, 429, 431, 431F and 431G Chulia Street, Penang, let by the Plaintiffs to the defendant on a monthly tenancy at the monthly rental of \$240/- payable in advance.

The tenancy was duly determined by a notice in writing dated 29th March, 1947 to quit expiring on the 30th April 1947 which was served on the defendant on the 29th day of March 1947 on which date the rent was more than 14 days in arrear.

* This case is reported for its intrinsic interest although the law is now contained in the Control of Rent Ordinance, 1948. Ed. M.L.J.